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6 *Attorneys for Plaintiffs and the Proposed
7 Classes in Porter v. Tesla, Inc.*

8 **UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**

10 JAMES PORTER, BRYAN PEREZ, DRO
11 ESRAEILI ESTEPANIAN, DENNIS
ROMANEZ, ARTEM KUPRIIETS, NEIL
12 KREUZER, WAFAY NADIR, and
KENNETH BROWN, on behalf of
13 themselves and all others similarly situated,

14 Plaintiffs,

15 v.

16 TESLA, INC. d/b/a TESLA MOTORS,
17 INC.,

18 Defendant.

19 **AND RELATED CASE**

20 SAMUEL VAN DIEST and SERGEY
21 KHALIKULOV, on behalf of themselves
and all others similarly situated,

22 Plaintiffs,

23 v.

24 TESLA, INC. dba TESLA MOTORS, INC.,

25 Defendant.

Case No. 4:23-cv-03878-YGR

AND

Case No. 4:23-cv-04098-YGR

***PORTER AND VAN DIEST
PLAINTIFFS' AMICUS CURIAE
BRIEF IN SUPPORT OF CORONA
PLAINTIFFS' OPPOSITION TO
DEFENDANT'S MOTION TO
DISMISS***

Judge: Hon. Yvonne Gonzalez Rogers

Hearing Date: January 30, 2024, at 2:00 p.m.
Oakland Federal District Courthouse
Courtroom 1, Fourth Floor
1301 Clay Street
Oakland, CA 94612

1 Plaintiffs in the related *Porter* and *Van Diest* actions bring similar claims alleging that
 2 Defendant Tesla, Inc. (“Tesla”) engaged in false and deceptive advertising by marketing the range
 3 capabilities of its electric vehicles, and the related *Corona* action alleges that Tesla modified the
 4 hardware and software controlling Tesla vehicles’ available-mileage instruments to overstate the
 5 vehicle’s range during charging and operation.¹ All Plaintiffs have brought claims under state
 6 consumer protection laws based on Tesla’s ongoing deceptive marketing and other conduct.

7 Tesla asserts that the Court should immunize the company from liability for this deceptive
 8 marketing because it complied with the Environmental Protection Agency’s (“EPA”) regulatory
 9 scheme, and merely repeated EPA range estimates. This is not the case. Tesla went well beyond
 10 merely advertising the EPA range estimates. Instead, Tesla engaged in advertising that created an
 11 impression among consumers that Tesla vehicles could meet the advertised driving ranges while
 12 concealing that such ranges could not be achieved under normal driving conditions, which are
 13 impacted by things like temperature, weather, and use of the vehicles’ other features. Notably,
 14 Tesla’s motion does not even address the Plaintiffs’ claims that Tesla manipulated how range was
 15 calculated and displayed in the vehicles.

16 Tesla has moved to compel the *Porter* and *Van Diest* Plaintiffs to arbitration, but it has
 17 moved to dismiss the *Corona* Plaintiffs’ claims, in part, based on purported federal preemption.
 18 The *Porter* and *Van Diest* Plaintiffs join with the *Corona* Plaintiffs in opposing the motion.

19 **I. ARGUMENT**

20 The *Porter* and *Van Diest* Plaintiffs support the *Corona* Plaintiffs’ arguments opposing
 21 the application of preemption under the Energy Policy and Conservation Act (“EPCA”). See
 22 *Corona v. Tesla, Inc.*, No. 4:23-cv-03902-YGR (N.D. Cal.), ECF No. 27 (“*Corona Br.*”, at 4–12.
 23 The *Porter* and *Van Diest* Plaintiffs offer this *amicus curiae* brief to explain how their allegations
 24 reinforce the inapplicability of preemption, because Tesla’s conduct goes well beyond merely
 25 repeating EPA mileage estimates.

26

27

28 ¹ Because of the similarities in the *Porter* and *Van Diest* Plaintiffs’ allegations, and for the sake of
 brevity, this brief cites only to the *Porter* Plaintiffs’ operative complaint. *Porter*, ECF No. 35.

1 As Tesla notes, “[a]s a matter of law, there is nothing false or misleading about []
 2 advertising . . . that identif[ies] the EPA” mileage estimates. *See Paduano v. Am. Honda Motor*
 3 *Co., Inc.*, 88 Cal. Rptr. 3d 90, 105 (Cal. Ct. App. 2009). While Tesla correctly explains the state
 4 of the law on this discrete issue, its explanation is inapposite because Plaintiffs do not claim that
 5 Tesla merely advertised the EPA estimated range. Rather, Plaintiffs allege that Tesla built and
 6 deployed software designed to deceive consumers by actively presenting exaggerated range data.
 7 *Porter*, First Am. Compl. (“FAC”), ¶¶ 69-71. Further, Plaintiffs allege that Tesla did this
 8 intentionally, “want[ing] to show good range numbers” in order to drive sales. *See id.* ¶ 71. Tesla
 9 and its CEO wanted Tesla customers to “feel good” about the vehicles, which could be achieved
 10 by artificially inflating their range estimates. *Id.*

11 Tesla’s advertised driving ranges are greatly exaggerated. An analysis demonstrated that
 12 the driving ranges of Tesla vehicles were among the most overstated in the electric vehicle market,
 13 with its vehicles “falling short of their advertised ranges by 26%, on average.” *Id.* ¶ 80. This is
 14 not particularly surprising, given that “Tesla consistently advertised overly *aggressive* estimates
 15 of the range within its vehicles,” whereas other manufacturers advertised *conservative* range
 16 estimates.” *Id.* ¶ 79. Such marketing bred confusion among prospective customers and among
 17 Tesla owners, who noticed that their vehicles’ ranges consistently fell short of what had been
 18 advertised to them. *Id.* ¶ 85. Customers complained to Tesla so frequently about the discrepancy
 19 between their vehicles’ estimated and actual driving ranges that Tesla created an in-house
 20 “Diversion Team,” whose sole purpose was to dispose of such complaints without performing
 21 any kind testing and to otherwise gaslight customers into believing that their vehicles were
 22 operating as promised. *Id.* ¶¶ 90-101.

23 Tesla deliberately designed its marketing to create the impression that Tesla vehicles had
 24 some of the longest driving ranges in the electric vehicle market. And Tesla did this despite
 25 knowing its vehicles could not meet the EPA ranges advertised. *Cf. id.* ¶ 80. On Tesla’s range
 26 webpage, which was specifically developed to advertise Tesla’s range capabilities to consumers,
 27 *see id.* at 16 n.36, Tesla claims that its vehicles “can travel some of longest driving ranges of any
 28 other production electric vehicle on the market.” <https://www.tesla.com/support/range> (last

1 visited Dec. 20, 2023). Notably, Tesla suggests that consumers set a charge limit for their
 2 vehicle—typically 80%. *Porter* FAC ¶ 50. In fact, Tesla suggests that consumers “should charge
 3 their vehicle to full 100% capacity only sparingly,” and “Tesla’s chief executive officer, Elon
 4 Musk, suggests that owners should only charge to 90% or 95% when necessary,” rather than to
 5 100% capacity. *Id.* ¶ 52. This is noteworthy because charge limits “directly impacts total range.”
 6 *Id.* ¶ 54. Importantly, the EPA estimated range is calculated based on full 100% battery charge.
 7 *See id.* ¶ 115. Thus, if a consumer were to view Tesla’s representations—which is a certainty,
 8 given their inclusion in the ordering process, *id.* ¶¶ 36, 40–45—and were to comply with Tesla’s
 9 instructions for charging (and setting charge limits of) the vehicle, the consumer would *not* be
 10 able to achieve the advertised EPA estimated range. *Id.* ¶¶ 53–54. Tesla’s Diversion Team even
 11 recognized that the EPA estimated ranges advertised to consumers were hypothetical figures,
 12 which could not be achieved under normal driving conditions, calling them a “prediction, rather
 13 than an actual measurement.” *Id.* ¶¶ 93, 96.

14 Notably, Tesla claims that the vehicle’s “[d]isplayed range is adapted based on fixed EPA
 15 test data, not your personal driving patterns.” <https://www.tesla.com/support/range> (last visited
 16 Dec. 20, 2023); *see also* *Porter* FAC ¶ 96. But this directly contradicts Tesla’s development of
 17 algorithms for estimating range that would display “rosy,” inflated projections for the distance its
 18 vehicles can travel on a full battery. *Porter* FAC ¶ 69. As Plaintiffs allege, Tesla’s software
 19 displayed range calculations based on its own proprietary calculations and projections—not based
 20 on EPA testing or data. *Id.* As the vehicle reached 50% or less, these projections vary drastically,
 21 as the algorithm calculates (and displays) more realistic projections. *Id.* ¶ 70.

22 Tesla, of course, knew these facts. However, Tesla chose to conceal them from consumers,
 23 relying only on advertising EPA estimated range figures, while actively concealing important
 24 information that directly impacted the “achievable range” from consumers. Moreover, Tesla made
 25 representations to consumers strongly suggesting that Tesla vehicles should be limited to 80%
 26 charge without simultaneously warning consumers that following such manufacturer suggestions
 27 would make achieving the advertised EPA estimated range impossible. Notably, Tesla could have
 28 simply included a warning to this effect when advertising the EPA estimated ranges—namely, by

1 warning consumers that the EPA estimated range was based on 100% battery charge, or that they
 2 did not reflect normal driving conditions. Indeed, Tesla could simply have incorporated the EPA's
 3 language specifically developed on this point, by stating "When fully charged, vehicle can travel
 4 about . . ." or by stating that "Actual results will vary for many reasons including driving
 5 conditions . . ." *See id.* ¶ 63. Tesla chose not to do so—likely because it saw greater opportunity
 6 for profit from a consumer base that "felt good" about a vehicle with a longer range. *See id.* ¶ 71.

7 Plaintiffs' allegations illustrate that Tesla's advertising was not merely limited to
 8 providing consumers the vehicles' EPA estimated ranges and nothing more. Rather, Tesla
 9 engaged in extensive marketing and branding in an effort to establish Tesla as one of the premier
 10 electric vehicles on the market capable of achieving the greatest driving range. *See id.* Its
 11 development of software and algorithms specifically designed to inflate the driving range of
 12 vehicles—to Tesla owners and potential customers—is sufficient to establish that Tesla has gone
 13 "beyond merely reporting the EPA-estimated [range]." *In re Ford Fusion and C-Max Fuel*
 14 *Economy Litig.*, No. 13-MD-2450, 2015 WL 7018369, at *26. "Plaintiff[s] do[] not challenge the
 15 disclosure of the EPA estimate itself," but instead allege additional statements by Tesla
 16 establishing the necessity of setting charge limits, which make it impossible to achieve the
 17 advertised EPA estimated ranges. *Yung Kim v. Gen. Motors, LLC*, 99 F. Supp. 3d 1096 (C.D. Cal.
 18 2015). Plaintiffs' allegations further establish that Tesla engaged in a deceptive marketing
 19 campaign by using proprietary algorithms designed to display exaggerated vehicle ranges and by
 20 the "use of the EPA estimates in a way that may give consumers the mistaken impression that
 21 they are able to achieve real-world mileage and tank range derived from those figures." *Id.*; *see also Paduano*, 88 Cal. Rptr. 3d at 110 (refusing to preempt plaintiff's CLRA and UCL claims
 22 based on automaker's "allud[ing] to [EPA] estimates in a manner that may give consumers the
 23 misimpression that they will be able to achieve mileage close to the EPA estimates").

25 To be clear, none of the *Porter* or *Van Diest* Plaintiffs are alleging that Tesla acted
 26 deceptively by merely stating the EPA estimated range. Rather, Tesla's marketing and conduct,
 27 coupled with its use of the EPA estimates" creates a misimpression among consumers that the
 28 advertised range is achievable, when it is not under normal driving conditions, particularly when

1 following Tesla’s suggestions for using the vehicles. This is borne out by the numerous
 2 complaints Tesla has received about this very issue—to which Tesla responded with more
 3 deception, by creating a team not to address these concerns but to simply dispose of them in
 4 summary fashion. Tesla’s conduct, marketing, and various representations regarding charging and
 5 range are designed in such a way as to suggest to consumers that Tesla vehicles achieve some of
 6 the best range on the market. This is not protected by the EPCA or FTC regulations.

7 Even if Plaintiffs’ claims were based only on an omission theory, their claims would still
 8 survive. A defendant owes a duty to disclose information about the sale of a product where the
 9 information is material, is “central to the product’s function,” and alleges at least one *LiMandri*
 10 factor. *See Hammerling v. Google LLC*, 615 F. Supp. 3d 1069, 1085 (N.D. Cal. 2022). Driving
 11 range is material and is an important factor in a Tesla purchase. *E.g.*, *Porter* FAC ¶¶ 4, 223 (at p.
 12 56), 236 (at p. 58), 245 (at p. 60). Further, vehicle range capabilities are central to the vehicle’s
 13 function because they directly impact how far the vehicle can drive—no different than the vital
 14 importance of gasoline and fuel economy for an internal combustion engine vehicle. *Id.* ¶¶ 224
 15 (at p. 56), 237 (at p. 58), 247 (at p. 60). And Plaintiffs have alleged multiple *LiMandri* factors:
 16 that Tesla had exclusive knowledge of the vehicles’ true range capabilities; that Tesla actively
 17 concealed this through its software and Diversion Team; and while Tesla discussed the
 18 “achievable range,” it still withheld material information. *E.g.*, *id.* ¶¶ 221 (at p. 55); *Hammerling*,
 19 615 F. Supp. 3d at 1085.

20 At bottom, Tesla asks the Court to condone a manufacturer’s sophisticated efforts to
 21 deceive the EPA and consumers merely because the manufacturer was initially successful in those
 22 efforts. But this does not support preemption. Accordingly, the Court should deny Tesla’s motion.

23 **II. CONCLUSION**

24 For the above reasons, and for the reasons explained in the *Corona* Plaintiffs’ Opposition
 25 to Tesla’s Motion to Dismiss, the *Porter* and *Van Diest* Plaintiffs respectfully request that the
 26 Court deny Tesla’s Motion to Dismiss. In particular, the Court should refuse to find federal
 27 preemption and allow Plaintiffs’ claims to proceed.

1 DATED: December 20, 2023

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CERTIFICATE OF SERVICE

I, William A. Ladnier, hereby certify that on December 20, 2023, I caused a true and correct copy of the foregoing *Porter* and *Van Diest* Plaintiffs' *Amicus Curiae* Brief in Support of *Corona* Plaintiffs' Opposition to Defendant's Motion to Dismiss to be served upon all counsel of record through the Court's ECF system, including:

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